

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

Inquiry Concerning Deployment of)
Advanced Telecommunications)
Capability to All Americans in a)
Reasonable And Timely Fashion, and)
Possible Steps To Accelerate Such)
Deployment Pursuant To Section 706)
of the Telecommunications Act of 1996)

CC Docket No. 98-146

**REPLY COMMENTS OF
NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND
ADVISORS, THE NATIONAL LEAGUE OF CITIES, AND THE UNITED STATES
CONFERENCE OF MAYORS**

INTRODUCTION

The National Association of Telecommunications Officers and Advisors (NATOA), the National League of Cities (NLC), and the United States Conference of Mayors (USCOM) ("Local Governments") respectfully submit these Reply Comments in response to the Commission's Notice of Inquiry in CC Docket No. 98-146 (released February 18, 2000). Local Governments oppose the comments of the Wireless Communications Association International (WCA), which largely repeat demands for regulation by the Commission that have already been addressed in other proceedings. The further preemption of state and local authority sought by WCA is unwarranted and unnecessary, and the issues raised by WCA are already being addressed in other proceedings.

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The Commission should decline to repeat in this proceeding the deliberations it has already undertaken elsewhere. State and local regulation of telecommunications antennas was specifically addressed in the Competitive Networks proceeding.¹ Forced access to government and private buildings, which raises serious constitutional issues, was also fully addressed in the Competitive Networks proceeding. Preemption of state or local RF regulation is outside the scope of the Advanced Telecommunications proceeding and is already being addressed by the Commission elsewhere. Thus, WCA's attempts to raise these issues in this proceeding are redundant.

Finally, Local Governments are concerned that WCA appears to be using broad generalizations alleging detrimental effects of state and local regulation, unsubstantiated by any citation to specific examples, in an effort to circumvent Commission rules designed to give municipalities fair notice and opportunity to respond.

I. WCA'S PROPOSAL TO EXPAND FEDERAL PREEMPTION OF STATE AND LOCAL ANTENNA REGULATION IS UNLAWFUL, AS SHOWN IN THE COMPETITIVE NETWORKS PROCEEDING.

In this proceeding, the Commission asked what regulatory factors may accelerate the deployment of advanced telecommunications capability.² In its comments, WCA touts the rapid growth of advanced services -- claiming among other things that wireless subscribership will grow from 200,000 to 9.4 million subscribers in the next five years. Given the spread of this

¹ *In the Matter of Promotion of Competitive Networks in Local Telecommunications* ("Competitive Networks Proceeding"), 14 F.C.C.R. 12673 (1999) (WT Docket No. 99-217) (CC Docket No. 96-98).

² *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion* ("Advanced Telecommunications Inquiry"), 14 F.C.C.R. 2398, ¶¶ 42-43, 48-49 (1999).

growth, it would seem odd to complain that the industry's expansion is being impeded. Yet WCA's comments also take the opportunity to repeat, among other things, the well-worn claim that state and local regulations "often prevent telecommunications providers, alternative multichannel video programming distributors ('MVPDs') and television broadcast stations from offering service."³ WCA argues that the Commission should respond to this vague allegation by radically expanding its preemption of state and local zoning authority.⁴

As Local Governments stated in their comments in the Competitive Networks proceeding (which are hereby incorporated by reference), the Commission lacks statutory authority under the Communications Act to extend its rules regarding video reception antennas to encompass all telecommunications antennas.⁵ The Commission may not rely on implied authority under various sections of the Communications Act to trump Congress's express statutory preservation of state and local authority.

³ Comments of Wireless Communications Association, International, Inc. at 26 ("WCA Comments").

⁴ WCA Comments at 27-29.

⁵ Joint Comments of the National Association of Counties, the United States Conference of Mayors, the National Association of Telecommunications Officers and Advisors, the Texas Coalition of Cities on Franchised Utility Issues, the City of Dearborn, Michigan, the District of Columbia Office of Cable Television and Telecommunications, Montgomery County, Maryland, Prince George's County, Maryland, the City of St. Louis, Missouri, and the City and County of San Francisco, California. *In the Matter of Promotion of Competitive Networks in Local Telecommunications*, at 20-22 (filed August 27, 1999) ("Local Governments Comments"). In particular, *see* Telecommunications Act of 1996 § 601(c)(1), 47 U.S.C. § 152 nt. ("This Act and the amendments made by this Act shall not be constructed to modify, impair, supersede Federal, State, or local law unless expressly so provided in such Act or Amendments").

II. THE COMMISSION SHOULD NOT EXPAND ITS CONSIDERATION OF THE ISSUE OF ACCESS TO MULTIPLE DWELLINGS UNITS BEYOND ITS ON-GOING PROCEEDINGS AND THE MORE THOROUGH RECORD THEREIN.

WCA's Comments ask the Commission to adopt access rules regarding multiple dwelling units (MDUs).⁶ In its first Report and Order in this docket, however, the Commission stated: "We are considering the issue of access to MDUs in several proceedings . . . In these proceedings, we can address more fully any questions regarding our statutory or constitutional authority to take any particular action and the need for action."⁷ Thus, the Commission has already recognized that there are other proceedings better suited to address the complex and competing rights surrounding broadband service provider access to MDUs.

In addition to the Fifth Amendment problems that forced access would create if inflicted upon private building owners, forced access to buildings owned by state and local governments would also create significant public safety, regulatory and public management issues. These constitutional and regulatory issues were addressed in depth in the comments of Local Governments in the Competitive Networks proceeding, which are incorporated herein by reference.⁸

The Commission is currently addressing the issue of forced access in the Competitive Networks proceeding, where affected parties have had a chance to comment in detail on the complex issues. That issue is only peripherally relevant here. Thus, there is no need to for the Commission to repeat its consideration of forced access in this proceeding.

⁶ WCA Comments at 33.

⁷ *Advanced Telecommunications Inquiry*, *supra*, note 2 at ¶ 104.

⁸ Local Governments Comments at 5-18.

III. THE RF EMISSION ISSUES RAISED BY WCA ARE OUTSIDE THE SCOPE OF THIS PROCEEDING AND ARE BEING ADDRESSED BY THE COMMISSION ELSEWHERE.

WCA also calls for further preemption regarding the health and safety effects of RF emissions.⁹ To the extent that local governments are preempted in this area, the Commission's rules already address this issue. If in fact further guidance would be useful, the Commission and the relevant local government associations should consider jointly developing non-compulsory guidelines to assist local officials as they review zoning requests from wireless operators.

IV. WCA'S BROAD GENERALIZATIONS ABOUT STATE AND LOCAL REGULATION FAIL TO PROVIDE APPROPRIATE NOTICE TO COMMUNITIES.

The Commission recently revised its *ex parte* rules to require that petitioners serve a copy of any preemption petition on each state or local government cited in the petition.¹⁰ LSGAC has asked the Commission to extend these requirements to Notices of Proposed Rulemakings and Notices of Inquiries as well.¹¹ The purpose of these requirements is to allow state and local governments a fair opportunity to respond to allegations made against them by interested parties before the Commission.

WCA's Comments are phrased in such a way as to circumvent this requirement. While WCA is quick to point out the successful deployment in cities nationwide as evidence of the importance of the service, WCA cites no specific examples of unreasonable or prohibitory

⁹ WCA Comments at 37-38.

¹⁰ See *Suggested Guidelines for Petitions for Ruling Under § 253 of the Communications Act*, 13 F.C.C.R. 22970 (1998).

regulation. Rather, WCA resorts to generalized statements, such as “troublesome non-federal restrictions on installation, use and maintenance of fixed wireless antennas... are targeted at *all* antennas...”¹² Such vaguely targeted statements reveal three defects. They contradict the examples of successful deployment that WCA offers; they deprive the Commission of concrete examples that might illuminate WCA’s claims; and they deprive state and local authorities of notice and an opportunity to respond. Local Governments are disturbed at this further evidence of what appears to be a trend toward nullifying the Commission’s notice requirements by making only vague and unspecific allegations.¹³

¹¹ See FCC Local And State Government Advisory Committee, Advisory Recommendation Number 2, *Notification to States and Localities Named in Commission Proceedings*, adopted June 27, 1997, <http://www.fcc.gov/statelocal/recommendation2.html>.

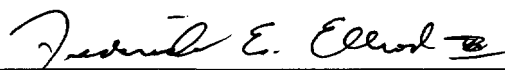
¹² WCA Comments at 29.

¹³ See, e.g., in the *Competitive Networks Proceeding*, *supra*, note 1: Comments of Global Crossing; Comments of Florida Power & Light; Comments of Metricom; Comments of RCN Telecom Services; Comments of Level 3 Communications.

V. CONCLUSION

The Commission should decline to address the above proposals by WCA in this proceeding, because they are more fully addressed in other ongoing proceedings.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Frederick E. Ellrod III", with a stylized flourish at the end.

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Certificate of Service

I hereby certify that I have caused to be mailed this 4th day of April, 2000, copies of the foregoing Reply Comments Of National Association Of Telecommunications Officers And Advisors, by first-class mail, postage prepaid, to the following persons:

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